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2 November 2006

**Ex Parte**

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area,* WC Docket No. 05-281.

Dear Ms. Dortch:

In its original opposition to ACS's forbearance petition, GCI demonstrated that ACS failed to provide any evidence or otherwise "make any case" to support forbearance from its obligation to provide unbundled subloops, inside wires, or NIDs.[1] In the intervening months, ACS has provided no evidence to refute this assertion and thus no basis for the Commission to determine – as section 160(a) requires – that ACS's section 251(c)(3) obligations with respect to these network elements are no longer necessary to protect consumers and ensure just, reasonable, and nondiscriminatory practices and, further, that "forbearance is consistent with the public interest."[2]

Indeed, in its single response on the topic, ACS states merely that "GCI would not need access to these elements where it serves the customer on its own loop facilities."[3] This skirts the issue completely. First, as GCI has demonstrated throughout this proceeding, there are a large number of Anchorage customers that GCI cannot serve on its own loop

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1 *Opposition of General Communication, Inc. to the Petition for Forbearance From Sections 251(c)(3) and 252(d)(1) of the Communications Act Filed by ACS of Anchorage*, WC Docket No. 05-281, at 59 (filed January 9, 2006).

2 47 U.S.C. § 160(a)(3).

3 *Reply Comments of ACS of Anchorage, Inc. in Support of its Petition for Forbearance From Sections 251(c)(3) and 252(d)(1),* WC Docket No. 05-281, at 16 (filed February 23, 2006) ("ACS Reply Comments").

facilities. Moreover, ACS overlooks the reality that any forbearance granted on the basis of GCI's own loop facilities will render essential access to cost-based subloops, inside wires, and NIDs to ensure that GCI can access buildings and inside wire to serve customers in multitenant environments.[4] Indeed, GCI and ACS are currently involved in a dispute over access to the cross-connects and inside wire for two concourses at the Anchorage airport; lease of subloops, NIDs, and inside wires may be the only way for GCI to serve small business customers on those concourses.

This was exactly the type of situation that the subloop, inside wire, and NID UNEs were meant to address. In the *Triennial Review Order* ("*TRO*"), the Commission expressly and extensively discussed the need for competitive LEC access to inside wire subloops and NIDs.[5] For one, the Commission concluded:

> We require incumbent LECs to unbundle the inside wire subloop. We conclude that a finding of impairment for the inside wire subloop *removes* a disincentive for competitors to deploy their own loop infrastructure. Without unbundled access to the inside wire subloop, a facilities-based competitor could conceivably construct an entire facilities-based network with no reliance whatsoever on the incumbent LEC's network elements, and still be unable to reach an end user in a multiunit premises or campus-type environment. Unless a competitor has access to the unbundled incumbent LEC inside wire subloop, competitors may simply have no alternative, especially in multiunit premises, if the premises owner simply refuses to enable the competitive LEC to construct its own wiring. In situations where the competitor may be able to negotiate the right to install its own wiring, consistent with our finding of financial/economic barriers for self-provisioning most loops and subloops, generally, *duplication of the inside wire subloop, particularly for a limited number of tenants is both cost and time prohibitive and could require competitors to incur sunk costs which may never be recoverable.*[6]

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[4] Indeed, should the Commission adopt ACS's proposed aggregated wire centers – and GCI believes it should not, *see Ex Parte Submission of General Communication Commission,* WC Docket No. 05-281 (filed October 10, 2006) – then the "loops" that GCI currently purchases in the non-host switch wire centers are in fact subloops. *See* 47 C.F.R. § 51.319(b). In that case, access to those subloops would be indispensable.

[5] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*TRO*").

[6] *Id.* at ¶ 354 (emphasis added).

In other words, according to the Commission's *TRO*, even if GCI's plant reached every building in Anchorage, it would still need access to inside wire subloops. Similarly, the Commission highlighted that "competitive LECs are impaired without access to the NID functionality" (1) where "a portion of the loop extends beyond the NID" and thus the competitive LEC "is entitled to the NID functionality as part of the inside wire subloop," or (2) where the competitive LEC has constructed its own NID but needs simply to disconnect the incumbent LEC's NID to access the inside wire subloop.[7] ACS has put forth no evidence to rebut the Commission's conclusions that competitive LECs are impaired as to inside wire subloops and NIDs.

ACS attempts to overcome the Commission's impairment findings through mistaken assertions that 47 U.S.C. § 224 and the Commission's inside wiring rules will provide the necessary access to multitenant customers absent 251(c)(3) obligations.[8] This attempt falls short in several respects. First, section 224 by its terms applies to a "pole, duct, conduit, or right-of-way."[9] It does not obligate ACS to provide access to subloops, inside wires, or NIDs, and in fact allows ACS to deny pole or conduit access in certain circumstances, including when space is exhausted.[10] Indeed, in the *Southern* decision, the United States Court of Appeals for the Eleventh Circuit held that a utility (which includes an ILEC such as ACS) has no duty to expand the capacity of a pole or conduit, even if it would do so for itself.[11] Thus, when conduit space is exhausted, there is no alternative to a subloop or inside wire UNE to reach a customer (and the intervening NID may also be necessary to complete the circuit).

Moreover, because ACS's arguments have nothing to do with specific conditions of the Anchorage service area, ACS is in effect attacking the Commission's core finding of impairment in the *TRO*. Even if ACS's arguments had any support – which they do not – this is not the proper proceeding in which to attack a nationally applicable, core finding of impairment.

Most damning of all, however, ACS fails to acknowledge that the Commission issued its *TRO* requiring incumbent LECs to unbundle inside wire subloops and NIDs even with the existence of section 224 and the Commission's own inside wiring rules. The Commission expressly recognized, for example, that there will be instances in which:

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7 *Id.* at ¶¶ 352, 353.

8 ACS Reply Comments at 16.

9 47 U.S.C. § 224(a)(4).

10 47 U.S.C. § 224(f)(2) (allowing a provider to "deny" access where it finds "insufficient capacity" or "for reasons of safety, reliability and generally applicable engineering purposes").

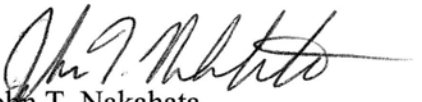
11 *Southern Co. v. FCC*, 293 F.3d 1338, 1346-7 (11th Cir. 2002)

> the wiring at [a] premises *will not be part of the incumbent LEC's local loop and our Inside Wire Subloop rules may not aid the competitor in reaching the customer* if the building owner will not enable the competitor to construct its own wiring (assuming such construction would even be economically feasible). In this situation, however, enabling competitive LECs to connect their loop to the incumbent LEC's unbundled NID gives competitive LECs access to the existing inside wire used by the incumbent LEC to reach its customers even though this inside wire may not be an UNE.[12]

Section 224 existed in its current form at the time that the Commission found CLECs to be impaired without access to inside wire and, where necessary, NIDs. ACS points to no change in law (and it cannot) that makes section 224 a more effective remedy than it was at the time of the *TRO*. And ACS points to no Anchorage-specific facts to demonstrate that where it owns the inside wire, GCI is not impaired without access to the inside wire UNE even where it supplies its own loop up to that point. Thus, despite ACS's best arguments, the Commission's conclusions remain: in the absence of the section 251(c)(3) obligation, ACS could deny access to certain subloops, inside wires, and NIDs.

Accordingly, and in light of ACS's failure to put forth an affirmative case demonstrating that any forbearance is warranted with regard to subloops, inside wire, and NIDs, the Commission must deny ACS's petition for forbearance from its 251(c)(3) obligations with regard to those UNEs.

Sincerely yours,



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[12] TRO at ¶ 354 n. 1070 (emphasis added).